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No. 797

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

LINDSAY B. SHAFER, LEWIS SHAFER, JOSEPH SHAFER AND LEWIS SHAFER, SR.,
Petitioners,

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Wilson K. Barnes, on behalf of Lindsay B. Shafer, Lewis Shafer, Joseph Shafer and Lewis Shafer, Sr., prays that a Writ of Certiorari issue to review the decision and judgment of the United States Court of Appeals for the Fourth Circuit, entered on January 4, 1956, affirming a decree of the United States District Court for the District of Maryland in favor of the United States of America (Plaintiff in the District Court) enjoining the Petitioners from preventing the measurement of the farms of the Petitioners pursuant to the Agricultural Adjustment Act of 1938, as amended and supplemented (hereinafter called the "Act"), and the Regulations, and entry on these farms and from

threatening or inflicting bodily harm on the employees or members of the Carroll County Agricultural Stabilization and Conservation Committee (hereinafter called the "County Committee") and employees of the Department of Agriculture attempting such entry.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit is not yet reported, but appears in the Appendix, infra, pp. 31-38. The Opinion of the United States District Court for the District of Maryland is reported in 132 F. Supp. 659. It also appears in the Appellants' Appendix filed in the United States Court of Appeals for the Fourth Circuit (R. 111-125).[1]

JURISDICTION

The judgment of the Court below (Appendix, infra, p. 39) was entered on January 4, 1956. The jurisdiction of the Court is invoked under 28 U.S.C.A. 1254.

QUESTIONS PRESENTED

The Petitioners are farmers owning and operating their own farms in Carroll County, Maryland. They have never applied for or received any payments of any kind from the Department of Agriculture, and they have never cooperated in any way with the programs of the Department of Agriculture under the Act or the preceding Agricultural Acts. They have never received a marketing card under the Act. All wheat raised on their farms is consumed by the cattle on those farms. After an unsuccessful attempt by the

[1] The reference "R" designates the Appendix of the Appellants (the Petitioners) in the Court of Appeals. There are no references to the Appellee's Appendix in that Court, so that there will be no confusion even though each Appendix has its own respective numbers in the Transcript submitted by the Court of Appeals.

United States to obtain an injunction against these farmers in 1954,[2] these farmers conspicuously posted their farms against trespass. In the meantime, new Regulations were attempted to be promulgated on March 15, 1955. An employee of the Department of Agriculture, a member of the County Committee and a "Reporter" attempted to enter the farms on April 27, 1955 but were denied such entry by threats of the use of force by the farmers. The United States filed its suit in the District Court for an injunction on May 2, 1955. The questions presented are:

1. Does the Act or do the purported Regulations[3] provide for any injunctive procedure in aid of entry or of measurement of farms and in the absence for such provisions, may the United States maintain an injunction suit in aid of entry or of measurement?

2. Did the United States either allege or prove irreparable injury and did the evidence in the District Court indicate any necessity for the issuance of the injunction?

3. Were the purported Regulations 728.550-597 and 728.510-526[4] lawful and valid when they were promulgated by a person other than the Secretary of Agriculture himself?

4. Were the purported Regulations 728.550-597 and 728.510-526 lawful and valid in view of the provisions of the Administrative Procedure Act?

5. Could the injunction suit be maintained without the joinder of the Secretary of Agriculture as an indispensable Party-Plaintiff?

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[2] See *U. S. v. Morelock* (and companion cases), 124 F. Supp. 932.
[3] Regulations 728.550-597, March 15, 1955, 20 F.R. 1621, R. 143-153.
[4] 19 F.I. 3249.

6. Are the Act, the purported Regulations and the injunction suit constitutional as applied to the situation presented by the case at bar, or do they violate the Fourth, Fifth and Tenth Amendments to the Constitution of the United States?

7. Was the imposition of wheat quotas reasonable or proper when such imposition disturbs and irreparably injures the established rotation of crops and in view of the permitted importation of wheat from other Countries?

8. Could the injunction suit be instituted or maintained on any theory prior to July 1, 1955, the beginning of the 1955-56 Marketing Year?

9. Could the injunction suit be maintained without proof of a request by the Secretary of Agriculture for the institution of the suit as alleged in the Complaint but not proved by the Respondent?

10. Did the Respondent prove the proper issuance and occurrence of the conditions precedent to the establishment of Wheat Quotas for the Marketing Year 1955-1956 as well as the necessary authorization and purported delegations of authority?

STATUTES INVOLVED

The Agricultural Adjustment Act of 1938, as amended, (7 U.S.C.A. 1281, et seq., 52 Stat. 31, et seq.) provides in pertinent part:

"7 U.S.C.A. Sec. 1340

"(1) The farm marketing quota under this chapter for any crop of wheat shall be the actual production of the acreage planted to wheat on the farm, less the normal production or the actual production, whichever is the smaller, of that acreage planted to wheat on the farm which is in excess of the farm acreage allotment for wheat.

"The normal production, or the actual production, whichever is the smaller, of such excess acreage is hereinafter called the 'farm marketing excess' of wheat. For the purposes of this section 'actual production' of any number of acres of wheat on a farm means the actual average yield of wheat for the farm times such number of acres.

"(2) During any marketing year for which quotas are in effect, the producer shall be subject to a penalty on the farm marketing excess of wheat. The rate of the penalty on wheat shall be 45 per centum of the parity price per bushel of wheat as of May 1 of the calendar year in which the crop is harvested.

"(3) The farm maketing excess for wheat shall be regarded as available for marketing, and the penalty and the storage amount or amounts to be delivered to the Secretary of the commodity shall be computed upon the normal production of the excess acreage. Where, upon the application of the producer for an adjustment of penalty or of storage, it is shown to the satisfaction of the Secretary that the actual production of the excess acreage is less than the normal production thereof, the difference between the amount of the penalty or storage as computed upon the basis of normal production and as computed upon the basis of actual production shall be returned to or allowed the producer. The Secretary shall issue regulations under which the farm market excess of the commodity for the farm may be stored or delivered to him. Upon failure to store or deliver to the Secretary the farm marketing excess within such time as may be determined under regulations prescribed by the Secretary, the penalty computed as aforesaid shall be paid by the producer. Any wheat delivered to the Secretary hereunder shall become the property of the United States and shall be disposed of by the Secretary for relief purposes in the United States or in foreign countries or in such other manner as he shall determine will divert it from the normal channels of trade and commerce.

* * * * * *

"(7) A farm marketing quota on wheat shall not be applicable to any farm on which the acreage planted to the commodity is not in excess of fifteen acres. * * *

"(8) Until the farm marketing excess of wheat is stored or delivered to the Secretary or the penalty thereon is paid, each bushel of the commodity produced on the farm which is sold by the producer to any person within the United States shall be subject to the penalty as specified in paragraph (2) of this section. Such penalty shall be paid by the buyer, who may deduct an amount equivalent to the penalty from the price paid to the producer.

* * * * * *

"(12) Notwithstanding any of the foregoing provisions, the farm marketing excess for any crop of wheat for any farm shall not be larger than the amount by which the actual production of such crop of wheat on the farm exceeds the normal production of the farm wheat-acreage allotment, if the producer establishes such actual production to the satisfaction of the Secretary. * * *"

"7 U.S.C.A. 1374

"(a) The Secretary shall provide, through the county and local committees, for measuring farms on which corn, wheat, cotton, peanuts, or rice is produced and for ascertaining whether the acreage planted for any year to any such commodity is in excess of the farm acreage allotment for such commodity for the farm under this chapter. If in the case of any farm the acreage planted to any such commodity on the farm is in excess of the farm acreage allotment for such commodity for the farm, the committee shall file with the State committee a written report stating the total acreage on the farm in cultivation and the acreage planted to such commodity."

"7 U.S.C.A. 1375

"(a) The Secretary shall provide by regulations for the identification, wherever necessary, of corn, wheat,

cotton, rice, peanuts, or tobacco so as to afford aid in discovering and identifying such amounts of the commodities as are subject to and such amounts thereof as are not subject to marketing restrictions in effect under this chapter.

"(b) The Secretary shall prescribe such regulations as are necessary for the enforcement of this chapter."

"7 U.S.C.A. 1376

"The several district courts of the United States are vested with jurisdiction specifically to enforce the provisions of this chapter. If and when the Secretary shall so request, it shall be the duty of the several United States attorneys in their respective districts, under the direction of the Attorney General, to institute proceedings to collect the penalties provided in this chapter. The remedies and penalties provided for herein shall be in addition to, and not exclusive of, any of the remedies or penalties under existing law."

Title 5 U.S.C.A. provides in pertinent part:

"5 U.S.C.A. 4

"4. *Vacancies in office of department heads; temporary filling.* In case of the death, resignation, absence, or sickness of the head of any department, the first or sole assistant thereof shall, unless otherwise directed by the President, as provided by section 6 of this title, perform the duties of such head until a successor is appointed, or such absence or sickness shall cease."

"5 U.S.C.A. 514

"514a. *Under Secretary of Agriculture; salary*

"There is hereby established in the Department of Agriculture the position of Under Secretary of Agriculture, to be appointed by the President, by and with the advice and consent of the Senate, and whose basic compensation shall be at the rate of $17,500 per annum."

"514b. *Same; duties*

"The Under Secretary of Agriculture is authorized to exercise the functions and perform the duties of the first assistant of the Secretary of Agriculture within the meaning of section 4 of this title and shall perform such other duties as may be required by law or prescribed by the Secretary of Agriculture."

"5 U.S.C.A. 1003

"1003. *Rule making*

"Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts * * *.

"*Notice; publication and contents*

"(a) General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

"(b) After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without

opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 1006 and 1007 of this title shall apply in place of the provisions of this subsection.

"Time of publication or service of rules

"(c) The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

"Petitions

"(d) Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule."

Title 28 U.S.C.A. provides in pertinent part:

"28 U.S.C.A. 1733(b)

"(b) Properly authenticated copies or transcripts of any books, records, papers or documents of any department or agency of the United States shall be admitted in evidence equally with the originals thereof. June 25, 1948, c. 646, 62 Stat. 946."

Title 44 U.S.C.A. provides in pertinent part:

"44 U.S.C.A. 301

"301. *Custody and printing of Federal documents; 'Division' created in Archives Establishment; Director, appointment and compensation.*

"The Administrator of General Services, acting through a division established by him in the National Archives Establishment hereinafter referred to as the 'Division', is charged with the custody and, together

with the Public Printer, with the prompt and uniform printing and distribution of the documents required or authorized to be published under section 305 of this title. There shall be at the head of the Division a director, appointed by the President, who shall act under the general direction of the Administrator of General Services in carrying out the provisions of this chapter and the regulations prescribed hereunder, who shall receive a salary, to be fixed by the President, not to exceed $5,000 a year."

REGULATIONS INVOLVED

The relevant purported Regulations appear in the Appellants' Appendix. They are as follows: Regulation 728.501-503, 19 F.R. 3863 (R. 140-142); Regulation 728.550 et seq., 20 F.R. 1621 (R. 143-153).

STATEMENT

The Petitioners are farmers who live on and till their own farms in Carroll County, Maryland. They rotate their crops on a three-year rotation (corn, wheat and hay) and feed all of the wheat grown on their farms to their cattle. None of the wheat moves in interstate commerce.

These farmers are part of the "faithful remnant" who have never asked or received any assistance, "benefits" or payments under any of the agricultural programs (Appendix, infra, p. 34, R. 53-54). They have never cooperated with any agricultural program (R. 55). They have never had any Wheat Marketing Card issued to them (R. 53-54), which would enable them to sell any of their wheat.

For 17 years, that is from February 16, 1938 when the Act was approved, until March 15, 1955, when True D. Morse purported to promulgate Regulation 728.555, there was no provision in the Agricultural Regulations for entry by reporters upon farms without the consent of the owner or possessor of the farmlands.[5]

[5] There is still no provision requiring the landowner or operator to consent to such entry.

In 1954, however, the United States attempted to obtain an injunction in the United States District Court for the District of Maryland against the same farmers, and other farmers in a similar situation, from interfering with the County Committee or its representatives from entering on the farms for the purpose of measuring acreage planted to wheat *and for a mandatory injunction requiring the farmers to identify the wheat planted on their farms for the 1954 harvest.* The Complaint in the 1954 suit was dismissed, the District Court holding that neither the Act nor the Regulations provided for entry, the officials of the Department of Agriculture had not complied with their own Regulations and the United States had a full, adequate and complete remedy at law under the Federal Rules of Civil Procedure. *United States v. Morelock* (and companion cases including the present petitioners), 124 F. Supp. 932. No appeal was taken from the decree in the *Morelock* case.

On March 15, 1955, True D. Morse, purportedly Acting Secretary of Agriculture, attempted to promulgate the new Regulations principally involved in this case.[6] Regulation 728.555 of the new Regulations provides that:

> "The county committee shall provide for the measurement of all farms in the county having a 1955 wheat acreage allotment * * * for the purposes of ascertaining with respect to each of such farms the acreage of wheat and whether such acreage is in excess of the farm wheat acreage allotment for 1955" (R. 143).

It provides (a) for the appointment of a "Reporter" (R. 144), (b) for assignment of farms to him (R. 144-145), and then as follows:

> "(c) Farm visit. A reporter shall visit each farm assigned to him for measurement and enter thereon if such entry will facilitate measurement. Upon request

[6] Regulations 728.550-597, 20 F.R. 1621, R. 143-155.

he will exhibit to the farm operator, producer, or owner, his assignment to measure the farm.

"(d) Methods of measurement. Measurement may be made by identification of fields or parts of fields by use of a map, aerial photograph, or by means of a steel or metallic tape or chain, or rod and chain, or by use of a measuring wheel when authorized by the Deputy Administrator for Production Adjustment, Commodity Stabilization Service, or by a combination of one or more of the foregoing methods. Measurement shall also be deemed to include an estimate when made in compliance with the provisions of paragraph (e)(1) of this section. The measurement will be entered by the reporter on the Form CSS-578 and filed in the county ASC office. Computations of acreages shall be made by an employee in the county ASC office from the data so obtained and the use of a planimeter or rotometer in connection therewith is authorized."

Wheat allotments for the farms of the Petitioners had already been established under the old Regulations[7] (R. 43).

The farmers (the Petitioners) had conspicuously posted their farms against trespass (R. 67).

On April 27, 1955, something over a month after the attempted promulgation of the new Regulations by Mr. Morse, Elmer A. Ambrogne, an employee of the Department of Agriculture, Frank Bushey, a member of the County Committee, and Monroe G. Haines, a local blacksmith who had been appointed a "Reporter", drove up to one of the farms (Farm No. 2432). Mr. Ambrogne had seen the sign prohibiting his entry, but, nevertheless, drove up just behind the back porch of the dwelling house (R. 64). The area was surrounded by the outbuildings on the farm (R. 172). The petitioning farmers ordered the three men off the farm

[7] For convenience in comparison, the former and present regulations are printed in parallel columns (R. 143-147).

and threatened to shoot Mr. Ambrogne if he attempted to enter (R. 61-63). Mr. Bushey and Mr. Haines pointed out that there was wheat growing on the fields on each side of the lane (R. 63). The three men then left that farm, and went to the other farm of the petitioners (Farm No. 965) and noted that wheat was growing on a field bordering on the public highway (R. 64). Mr. Haines, the Reporter, was able to see the southerly fields of the first farm when he went on an adjoining farm (R. 89). All of the fields on both farms of the Petitioners (Nos. 2432 and 965) with a designation of wheat which was planted in those fields *for the year 1955* appear in the handwriting of the Reporter on the official aerial map of the County Committee (R. 81-83). Defendants' Exhibit 1 (R. 172).

Notwithstanding the complete and fully informative aerial map, the United States on May 2, 1955 filed the Complaint in this case in the District Court against the present petitioners, alleging that the United States Attorney and his Assistant "acting under the directions of the Attorney General and upon the request of the Secretary of Agriculture" (R. 2) filed the Complaint praying (1) for an injunction to restrain the petitioning farmers from interfering or by threats of force and violence preventing the "measurement" of the wheat acreage, (2) for a preliminary injunction restraining the farmers "from interfering with the entry of the reporters on said farms for the purpose of measuring the 1955 wheat acreage", (3) for a permanent injunction restraining interference with entry, and (4) other relief (R. 5).

The farmers filed their Answer on May 23, 1955 setting up their defenses (R. 6-18).

The case was tried on its merits 4 days later, on May 27, 1955, without opportunity for any preliminary discovery procedure.

In addition to the above facts, the evidence established that by the Census of 1950, there were 5,382,162 farms in the United States, of which 1,516,048 were wheat farms. In the 1955-56 Wheat Referendum, only 284,646 farmers voted as contrasted with 447,757 farmers in the 1954-55 Wheat Referendum.

In Carroll County the vote in the 1955-56 Wheat Referendum was heavily against imposing the Quota (27% in favor, 73% against). The necessary two-thirds majority of farmers voting in the Wheat Referendum for 1955-56 was obtained from thirteen States, Kansas, Nebraska, North Dakota, South Dakota, Montana, Oklahoma, Washington, Minnesota, Texas, Illinois, Indiana, Missouri and Colorado. These thirteen States had a total vote of 179,641 out of a total of 284,646, two-thirds of which latter figure is 176,430.

The Government of the United States has permitted the importation of wheat for a number of years in the past. For the crop year 1950-51, 31,000,000 bushels; 1951-52, 21,000,000 bushels; 1952-53, 5,000,000 bushels; 1954-55, 3,000,000 bushels and for the year 1955-56 the estimate was 3,000,000 bushels. The duty on this wheat is $.21 a bushel as contrasted with a subsidy for exportation of wheat of $.76 a bushel. The penalty for growing wheat in excess of the wheat quota on each farm, is $1.13 a bushel.

Witnesses from Ohio testified that in that State there was organized opposition to the wheat quota system.

The Honorable Ezra Taft Benson, Secretary of Agriculture, by a letter dated April 5, 1955, formally advised the Sub-Committee on Wheat of the Committee of Agriculture of the House of Representatives of the United States at its hearing on June 1, 1955, on S. 46 and H.R. 1834 and 4570 (to exempt specifically wheat fed on the farm from the wheat quota system), as follows:

"We have long felt that the wheat marketing quota provisions contained in present legislation are needlessly restrictive. When marketing quotas have been voted for wheat, producers who harvest wheat in excess of their allotment are subject to penalty, whether they market their wheat or whether they feed it on their farms. Farmers who produce wheat only for feed and who do not want price support on their wheat or any other crop, are thus forced to curtail their operations and are in violation of the law and subject to penalty if they fail to do so. Since such wheat does not enter any marketing channels, its production does not affect the operation of wheat price support programs and, therefore, should not be subject to marketing quotas.

"The principle of enforcing compliance of minority groups of producers with a program determined by a majority of producers, underlies marketing quotas. It appears that the existing legislation needlessly regiments the operation of all wheat farms, regardless of whether wheat is produced for the market or for the farmer's own use. With the present legislation providing for no marketing quotas on production of corn and price supports for feed grains other than corn being available to producers with no restrictions on production, the restrictions upon feeding of wheat produced on an individual's own farm appear to be untenable" (R. 169-170).[8]

The District Court ruled in favor of the United States, notwithstanding its ruling in 1954 that the United States had a full, complete and adequate remedy at law by Rules

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[8] This is not mentioned by the Court of Appeals in its Opinion (Appendix, infra), but it was in the Appellants' Appendix, was fully considered in the Appellants' Brief and fully argued. Although this report by the Sub-Committee was not available and was not known at the time of the hearing in the District Court, it should be considered by the Court of Appeals, *Savannah Electric Co. v. Federal Power Commission*, 164 F. 2d 408.

26-37 of the Federal Rules of Civil Procedure, and especially by Rule 34. It, however, suspended the operation of the decree for an injunction passed July 1, 1955, until after this case was decided by the Court of Appeals and by this Court. The Court of Appeals affirmed the decree of the District Court on January 4, 1956 (Appendix, infra, p. 31).

REASON FOR GRANTING THE WRIT

1. **Important questions of Federal law have been decided which have not been, but should be, settled by this Court.**

   a. *The validity of the novel and unprecedented provision for purported forcible entry on 1,516,048 wheat farms in the United States by purported Regulation 728.555 should be finally determined by this Court.*

After 17 years to the contrary and with no specific authorization in the Act, Regulation 728.555, allegedly promulgated by Mr. Morse on March 15, 1955, purports to authorize "reporters" to enter upon the farmlands of the 1,516,048 wheat farms in the United States if such entry "will facilitate measurement". Forcible entery was never *necessary* heretofore, and there are strong indications that 7 U.S.C.A. 1374, providing that "the Secretary shall provide, through the county and local Committees, for measuring farms on which wheat * * * is produced and for ascertaining whether the acreage planted * * * is in excess of the farm acreage allotment", was never intended by Congress to include *by implication* the power to provide for forcible entry on the farms. Indeed, the contrary is indicated by the debate in the Senate on this very section in which Senator Pope, a proponent of the Act, stated in reply to questions of Senator McAdoo (an opponent of the Act) that the "measuring of

crops, provided for in Section 1374 was the same as 'measuring' under the Soil Conservation Act" (R. 162-164).[9]

The contemporary and administrative interpretation of the Act and Congressional re-enactment of Section 1374 confirms the interpretation that Sec. 1374 did not give the Secretary the power to provide for entry on the farms without the consent of the farmers. It is significant that for 17 years the Regulations had provided either (a) that the measurement would proceed in accordance with the usual practice of the Agricultural Adjustment Administration (See 728.229, 6 F.R. 2698) or (b) that in the event of the lack of consent for any proposed entry, an administrative procedure for determining the farm acreage excess which did not involve entry would apply. (See former Regulation 728.455, with Instructions (R. 145-147)). Congress with this initial and long continued administrative construction in mind re-enacted Sec. 1374 without substantial change.[10]

The farmers firmly believe that their rights of privacy and of exclusive possession of their farms are guaranteed to them by the State Trespass Laws (R. 171) and the ownership and rights to possession of their land are matters re-

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[9] There is no doubt that "measuring" under the Soil Conservation Act, 16 U.S.C.A., Sec. 590 (Act of 1937, Ch. 85) as well as under the Soil Conservation and Domestic Allotment Act of February 29, 1936, now 16 U.S.C.A. 590 5-n, provided specifically for measurements, surveys, and investigations by the Secretary but *limited entry* upon the land either upon obtaining proper consent or by voluntary action. See 16 U.S.C.A. 590b. But for this representation the Act may not have passed the Senate as there were only 56 votes in the affirmative.

[10] The word "peanuts" was added by the Act of April 3, 1941, c. 39, Sec. 8, 55 Stat. 92, and Sub-section (b), was added by the Act of August 29, 1947, c. 518, No. 2(b), 63 Stat. 676. The contemporaneous and long continuing administrative interpretation is entitled to great weight in construing the meaning of the word "measurement". *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 116, 91 L. Ed. 1375, 1382 (Douglas, J., 1947). This administrative construction must be deemed to have received Congressional approval by re-enactments without material change. *U. S. v. Dakota-Montana Oil Co.*, 288 U.S. 459, 466, 77 L. Ed. 893, 898 (1933 — Stone, J.).

served to the States or to the people by the Tenth Amendment to the Constitution of the United States. If they are in error as to this, they believe that the invasion of their rights of privacy and of the possession of their land, without any search warrant or any process issued by any judicial officer, is a plain invasion of their rights under the Fourth and Fifth Amendments, as amounting to an unreasonable search and as denying them their rights without due process of law.

The only sanction imposed by the Act is the collection of a penalty. This is a quasi-criminal penalty and interest does not run on a judgment for such a penalty. *Rogers v. U. S.*, 332 U.S. 371, 68 S. Ct. 5, 92 L. Ed. 3 (1947 — Black, J.). See also: *Western Fruit Growers v. U. S.*, 124 F. 2d 381, 387 (CCA-9 — 1941, Stephens, Ct. J.). The enforcement of the penalty is within the purview of the Fourth Amendment against unreasonable searches and seizures. *Boyd v. U. S.*, 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746, and is within the purview of the protection of the Fifth Amendment against self-incrimination. *Lees v. U. S.*, 150 U.S. 476, 14 S. Ct. 163, 37 L. Ed. 1150.[11]

The Government, without exception prior to March 15, 1955, so far as the reported cases are concerned, has been able to obtain judgments for the penalty even where entry was refused by the farmer and no entry was attempted.[12]

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[11] Both the District Court and the Court of Appeals relied on *Hester v. U. S.*, 265 U.S. 57, 44 S. Ct. 445, 65 L. Ed. 898, to the effect that the protection of the Fourth Amendment does not cover open fields, so far as the suppression of evidence obtained by trespass on land in a criminal case is concerned. This begs the question in this case, which is, "Can a landowner prevent the commission of a misdemeanor of trespass, *in limine*, by the use of the necessary force to prevent the commission of the crime?"

[12] *Rogers v. U. S.*, 332 U.S. 371, 68 S. Ct. 5, 92 L. Ed. 3; *Usher v. U. S.*, 146 F. 2d 369; *U. S. v. Locke*, 56 F. Supp. 999; *U. S. v. Biehunko*, 55 F. Supp. 706.

It seems clear that there is no "necessity" for the new purported Regulations.

The questions of forcible entry and the construction of Sec. 1374 were not involved or passed on by this Court in *Wickard v. Filburn*, 317 U.S. 111, 63 S. Ct. 82, 87 L. Ed. 122, and the *Filburn* case is also distinguishable on the facts from the case at bar.[13]

The District Court itself recognized that this is a "test case" for the validity of the new purported Regulations and that the effect of the injunction should be stayed until this Court determines the validity of new Regulation 728.555.

Whatever the decision on the merits on all of these matters might ultimately be, the farmers who do not, and never have received any Federal Agricultural payments, are convinced that the officials of the Department of Agriculture have no right to invade their farms without the permission of the farmers. They feel no moral obligation to submit to the trespass as they have not bartered away their rights by receiving any payments and the overwhelming majority of the wheat farmers in Carroll County are opposed to the wheat program. They feel no moral obligation from a "vote" of a minority of farmers, and a vote which is carried by thirteen midwestern and western States having conditions quite different from those in Carroll County. They believe that the imposition of penalties under these circumstances is an aggravated case of "guilt by

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[13] The case at bar is to be distinguished from *Wickard v. Filburn* in two important respects: (1) the farmers in this case have never received any payments or benefits of any kind under the Agricultural programs as had Filburn; cf. *Everson v. Board of Education*, 330 U.S. 1, at 27-28, with 317 U.S. 120, at 131 and 133; and, (2) in the present case, it appears that Secretary has formally determined and declared that the wheat wholly consumed on the farm as feed, *does not affect* the wheat control program.

association". They are prepared to defend their rights by the use of necessary force to prevent the trespass. They are organized in Ohio to resist the invasion of their rights. If their position is correct, their rights should be vindicated by this Court; if they are in error, this Court should point that out. Otherwise, there will be no peace in an already troubled field in which Federal power has been unwisely (and unconstitutionally) extended and abused. Fortunately, there has been no actual bloodshed up to the present time. This Court can hardly "wash its hands" of this situation. It should grant the Writ of Certiorari and determine the question.

b. *Inasmuch as the* **only** *sanction in the Act is the enforcement of a penalty, and there is no provision in either the Act or the purported Regulations for any injunctive procedure in aid of entry or of measurement, this Court should determine whether the United States Attorney, allegedly on behalf of the United States can nevertheless file and maintain a Complaint for an injunction.*

The *only* sanction imposed by Chapter 35 of the Act for growing wheat in excess of the farm acreage allotment is the collection of a penalty. "Measurement", as provided by Section 1374 is for a specific purpose, namely, to determine "whether the acreage planted for any year * * * is in excess of the farm acreage allotment for such commodity for the farm * * *". The Act directs that the *Secretary, through the County or local Committees* shall provide for measurement. Congress intended that "measurement" was to be accomplished on a local basis by Committees elected by the local farmers themselves, rather than on a centralized basis by officials from Washington. There is no suggestion in the Act that either the United States, the Secretary or

the County Committee has the power to seek an injunction in aid of entry or even in aid of "measurement". The review procedure set up in 7 U.S.C.A. 1363, 1364, 1365 and 1366 by way of a Review Committee appointed by the Secretary, with conclusive findings of fact, was undoubtedly thought to be sufficient to establish the farm excess acreage for all purposes of the Act.

Sec. 1376 giving the District Court jurisdiction "specifically to enforce the provisions of this Chapter" does not confer any additional powers. Contrast the provisions of Sec. 1376 with Sec. 608(a)(6) relating to the enforcement of Chapter 26 of the Act.[14] In Sec. 608 injunctive procedure when needed is *specifically* granted, as under Chapter 26 "orders" are issued which may need enforcement by way of injunction. There are no orders issued under Chapter 35. By *specifically* providing for injunctive procedure in the enforcement of Chapter 26 and by omitting such a provision in Sec. 1376 for the enforcement of Chapter 35, it seems clear that Congress intended not to grant this extraordinary and unnecessary power for the enforcement of Chapter 35, where the imposition of the penalty was the exclusive sanction.

Nor do the new purported Regulations provide for injunctive procedure in aid of entry or of measurement. Not only is there no provision requiring the farmer to permit an unobstructed entry, and no provision for injunctive relief if there is obstruction by the farmer, but Regulation 728.566 (R. 148) specifically provides for that situation, namely, that the producer on the farm "shall be ineligible to receive marketing cards * * * if determination of the

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[14] Sec. 608(a)(6), provides:

"(6) The several district courts of the United States are vested with jurisdiction specifically to enforce, *and to prevent and restrain any person from violating any order, regulation, or agreement*, heretofore or hereafter made or issued pursuant to sections 601-608 * * * of this title * * *." (Emphasis supplied.)

1955 wheat acreage is prevented by any producer on the farm.[15]

Unless the Act provides for injunctive procedure to enforce Chapter 35 and unless the Secretary in the Regulations avails himself of such a granted power, no injunction suit can be filed or maintained. The present injunction suit seems clearly beyond any powers granted by Congress and unauthorized by the purported Regulations. This Court should determine that this unprecedented and unauthorized suit is invalid, as it denies to the Petitioners due process of law in every sense.

c. *The injunction suit could not be maintained without proof of a request by the Secretary for the institution of suit as alleged in the Complaint but not proved.*

The Complaint in this case definitely alleged that the injunction suit was brought by the United States Attorney "acting under the direction of the Attorney General, *upon request of the Secretary of Agriculture* * * * for the purpose of enforcing against the Defendants the provisions of the Act * * * relating to the measurement of farms on which wheat is produced and *specifically for the purpose of ascertaining whether the acreage planted to wheat on such farms is in excess of the wheat acreage allotment established therefor under the Act* (R. 2). It was further alleged that "without official measurement" the Plaintiff (Respondent) is *"unable to determine the amount of penalty due,* if any, with respect to the wheat growing on each of said farms" (R. 4).

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[15] Cf. Regulations 728.592 and 728.585 which provide for the institution of proceedings by the United States Attorney for the penalty and for the failure to keep records by warehousemen, et al., or the making or keeping of false records. There is no such provision in regard to the institution of any proceedings if entry or measurement is obstructed.

The alleged "request" by the Secretary was put in issue by the Answer (R. 13).

The request of the Secretary to institute the attempted "enforcement" action — presumably to aid in the enforcement of the penalty, the only sanction authorized by Congress — is a condition precedent to the institution of the suit and must be proved by the Plaintiff. It obviously was not proved, because it could not be proved. The conclusion that the Secretary never requested the institution of the suit is inescapable. This issue was not dealt with specifically by the Court of Appeals although it was raised by the pleadings, decided against the Petitioners in the District Court, duly briefed and argued on appeal. It is an important issue as the Petitioners and all other wheat farmers in the United States are entitled to the judgment of the Secretary himself in regard to whether suit should be filed. It seems clear that Mr. Benson would never have authorized the filing of such a suit under the circumstances presented by this case. This Court should determine this important issue as otherwise the responsibility of Cabinet Heads of the Executive Department to Congress and to the public will be a thing of the past.

d. *The Rule-making power cannot be performed by the Under-Secretary of Agriculture under 5 U.S.C.A. 4, (514(a) and 514(b)); nor under The Reorganization Act of 1949 and Reorganization Plan No. 2 of 1953.*

As later pointed out, the Rule-making power granted by the Act *to the Secretary* is personal to him as involving his judgment and discretion and an attempted exercise by anyone else is contrary to the decision of this Court in *Cudahy Packing Co. v. Holland*, 315 U.S. 357.

The Lower Court attempted to sustain the promulgation of the new purported Regulations by Mr. Morse, the Under Secretary, by 5 U.S.C.A. 4, 514(a), (b). It is not clear how

the subdelegation to James A. McConnell and Earl L. Butz could be justified under these provisions in any event as they are not Under Secretaries. As pointed out, these sections providing for the temporary filling by the first assistant of the place of the Head of any Department in the case of the death, resignation, absence or sickness of the Head of the Department and the performance of the duties of the Head of the Department until a successor is appointed or such absence of sickness shall cease, would not confer the rule-making power on the Under Secretary, as under the Act this power is *personal* to the Secretary, himself.

The Lower Courts were of the opinion that the Reorganization Act of 1949 and Reorganization Plan No. 2 of 1953, together with an Order issued by Secretary Benson on August 24, 1953, purporting to delegate not only his *functions* as Secretary of Agriculture, but all of his POWERS as well, with certain exceptions, not only to the Under Secretary but to each Assistant Secretary, severally (R. 134-136), were sufficient to sustain the validity of the new purported regulations. The creation of this administrative Hydra is not authorized by either the Reorganization Act of 1949 or by Reorganization Plan No. 2 of 1953 which plan permits the delegation by the Secretary of his *administrative functions* but not of his rule-making power. It is vitally important to the orderly administration of the Executive Branch of the Government that the scope of delegation of authority be defined and classified by this Court. The attempted creation by the Secretary of five additional "Secretaries", the appointment of one of whom is not confirmed by the Senate, with *identical powers and functions* as those of the Secretary, himself, should be viewed with alarm by this Court. It was never intended by Congress. This diffusion of primary authority in the Executive Branch of the Government in effect divorces the Head of the Department from effective contact with the actual operation of the Department. The facts in this case, as well as more recent

events, show the evil effects of this unwarranted and unlawful attempted delegation.[16] This Court should review and finally decide these important issues.

e. *The Court of Appeals and the District Court held that the Respondent had proved the necessary conditions precedent to the establishing of wheat quotas and necessary authorizations and delegation of authority contrary to the Federal Register Act and Rule 44 of the Federal Rules of Civil Procedure and 28 U.S.C.A. 1733 (b) and 44 U.S.C.A. 301.*

Government Exhibit No. 1 (R. 126-129) attempting to establish who would perform the duties of Secretary in case of the absence, sickness, resignation or death of the Secretary, the Under Secretary and the Assistant Secretaries, was essential to establish the validity of the Proclamation of the Result of the 1955 Wheat Referendum by Mr. Butz and the Notice of Determination for Regulations 728.510-526 under the Administrative Procedure Act by Mr. McConnell. This Exhibit was not published in the Federal Register and had no binding effect on the Petitioners. 44 U.S.C.A. 307.

Nor was the document a properly authenticated copy pursuant to 28 U.S.C.A. 1733 (b). (Act of June 25, 1948, Chapter 646, 67 Stat. 946.) This evidence act was adopted *subsequent* to the adoption of Rule 44 of the Federal Rules of Civil Procedure and "properly authenticated" documents mean those documents properly authorized under Rule 44. Legal custody of the document was in the Administrator of General Services, 44 U.S.C.A. 301, and either he or his

[16] It is beyond belief that the Secretary, himself, would have authorized this extraordinary suit, with such inflamatory results, when *he* was of the opinion (which he formally expressed to a Committee of Congress) that the wheat involved in the type of situation presented by this case, had no effect on the wheat program and enforcement of penalties would be unreasonable and unwarranted. It is significant that although his authorization was alleged and put in issue by the Answer, such authorization was never proved.

deputy must attest the document with a certification that the Administrator has custody of the document. As this was not done, the document was inadmissible into evidence. The effect of these Statutes upon the certification of documents is an important procedural question which this Court should finally determine for the orderly course of proceedings in the Trial Courts.

2. Important questions of Federal law have been decided in a way in conflict with applicable decisions of this Court.

a. *The rule-making power given by the Act is personal to the Secretary and may not be exercised by any other person; the holding of the Lower Court to the contrary is in conflict with Cudahy Packing Co. v. Holland, 315 U.S. 357, 62 S. Ct. 651, 86 L. Ed. 895.*

The rule-making power is conferred on *the Secretary* by 7 U.S.C.A. 1375. The word "Secretary" is defined by 7 U.S.C.A. 1301 (a) (7) to mean "Secretary of Agriculture". The power thus given is *personal* to the Secretary as it involves the exercise of judgment or discretion.[17] This Court held in *Cudahy Packing Co. v. Holland,* supra, that the power granted by Congress to the Administrator of the Wage and Hour Division of the Department of Labor to sign and issue a subpoena duces tecum was personal to the Administrator and could not be exercised by the Regional Heads, although the Administrator had attempted to delegate the power to them. The rule-making power involved in the case at bar involves far greater judgment and discretion. The two critical new purported Regulations in this case were issued by True D. Morse; others were issued by J. A. McConnell and one by Earl L. Butz. The public

[17] See Vom Baum "Federal Administrative Law" (1942), Sec. 10-A (Supplement).

is entitled to the judgment of Ezra Taft Benson in the exercise of the rule-making power as the Act requires. A contrary holding seems clearly in conflict with the *Cudahy Packing Co.* case and this error should be forthwith corrected by this Court.

b. *The new purported Regulations 728.550-597 and 728.510-526 are invalid as being in conflict with the provisions of the Administrative Procedure Act, 5 U.S.C.A. 1003 and the Decision of this Court in Morgan v. U. S., 298 U.S. 468, 80 L. Ed. 1288.*

The Secretary, himself, gave notice in the Federal Register that *he* would promulgate the new Regulations pursuant to The Administrative Procedure Act, 5 U.S.C.A. 1003(a) and gave notice to the public that there must be a submission of views *to the Secretary* within 15 days after the publication as required by 5 U.S.C.A. 1003(b). It is presumed because of the publication in the Federal Register that *the Secretary* received the views and heard the testimony. It is equally clear that *the Secretary did not* promulgate the Regulations. This was allegedly done by True D. Morse, Acting Secretary of Agriculture, 20 F.R. 1621 (R. 143-153).

The person who conducted the hearing, heard the testimony and who was designated in the Notice to promulgate the Regulations did not in fact promulgate the Regulations. This was done by another person. This brings the decision in the Lower Court holding that this lawfully can be done, squarely in conflict with the decision of this Court in *Morgan v. U. S.*, supra,[18] and denies the Petitioners due process of law.

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[18] In the *Morgan* case, the Secretary of Agriculture purported to fix maximum rates to be charged by the marketing agencies for buying and selling livestock at the Kansas City Stockyards. The Secretary attempted to delegate to an Acting Secretary the determination of the issues in regard to the reasonableness of the rates involved.

3. The Court of Appeals has rendered a decision in conflict with Hawthorne v. Fisher, 33 F. Supp. 891 (Three-Judge Court, 5th Circuit, Hutcheson, Ct. J., Bryant and Atwell, D.J.), Massachusetts Farmers Defense Committee v. U. S., 26 F. Supp. 941 (Three-Judge Court, First Circuit) and Beranek v. Wallace, 25 F. Supp. 841 (Three-Judge Court, Seventh Circuit) in holding that the Secretary of Agriculture was not an indispensable Party Plaintiff.

The enforcement of the Act is vested exclusively in the Secretary. Sec. 7 U.S.C.A. 1375 and 1376. This is held in the cases mentioned involving suits for injunctions to *restrain the enforcement of the Act.* If the Secretary is an indispensable party defendant when a citizen seeks to restrain the enforcement of the Act, he is an indispensable party plaintiff to a suit to enforce the Act. In the penalty cases cited by the Court of Appeals in which the United States was the plaintiff, this point was not raised. The United States claims in this suit, that the suit is not one for a penalty, but for an injunction allegedly to enforce the Act. This must be done by the Secretary.[19]

The oral argument was heard before the Acting Secretary. Thereafter the Secretary, himself, passed the Order in the case. This Court held that this purported action by the Secretary was void.

[19] Cf. 7 U.S.C.A. 1365, providing for the institution for Court review of the Review Committee findings in regard to the farm marketing quota, in which it is specifically provided that the dissatisfied farmer may "file a bill in equity against the review committee as defendant in the United States District Court" or in the State Court for the purpose of obtaining a review. It is not suggested that the suit should be brought against the United States.

There is no provision in the Act which requires or provides that an enforcement action be brought in the name of the United States. When it is intended that this be done, Congress *expressly* provides for it. See *U. S. v. San Francisco,* 310 U.S. 16, Note 3 on page 18, setting forth Section 9n of the Raker Act of December 19, 1913, Chapter 4, 38 Stat. 242, 84 L. Ed. 1050 at 1054.

It is quite important to litigants that the Secretary himself be required to be a party-plaintiff in this type of extraordinary enforcement suit. It facilities discovery and necessarily brings the suit to the attention of the Secretary himself. It seems obvious that if that had been done in this case, the suit would never have been brought. This important matter should be finally determined by this Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that this Petition for Certiorari should be granted.

WILSON K. BARNES,
Attorney for the Petitioners.

APPENDIX

OPINION

(Filed January 4, 1956)

UNITED STATES COURT OF APPEALS
For The Fourth Circuit

No. 7091

Lindsay B. Shafer, Lewis Shafer, Joseph Shafer, and Lewis Shafter, Sr.,
Appellants,

versus

United States of America,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE

(Argued November 14, 1955. Decided January 4, 1956.)

Before PARKER, Chief Judge, and SOPER and DOBIE, Circuit Judges.

Wilson K. Barnes (John Wood and Stanford Hoff on brief) for Appellants, and Neil Brooks, Attorney, Department of Justice, and George Cochran Doub, United States Attorney, (J. Stephen Doyle, Jr., Attorney, Department of Justice, James H. Langrall, Assistant United States Attorney, and Donald A. Campbell, Attorney, U.S. Department of Agriculture, on brief) for Appellee.

SOPER, Circuit Judge:

This suit is brought by the United States against certain wheat farmers in Carroll County, Maryland, who refused

to permit representatives of the Secretary of Agriculture to enter their farms and measure wheat acreage therein under the provisions of the Agricultural Adjustment Act of 1938 as amended. 7 U.S.C.A. §§1281 et seq. The purpose of the proposed entry was to ascertain whether the acreage planted to wheat on the farms was in excess of the wheat acreage allotment established under the statute. The purpose of the suit was to obtain an injunction enjoining the defendants from interfering with the entry of the agents on the farms and the measurement of the wheat acreage. The suit was resisted on numerous grounds, but after a hearing at which evidence was taken, the District Judge issued the injunction as prayed and the farmers appealed.

The general scheme of the statute as related to wheat was stated in *Wickard v. Filburn*, 317 U.S. 111, 115, to be the control of the volume of wheat moving in interstate commerce so as to avoid surpluses and shortages and the resulting abnormally low and high wheat prices which the farmers, without federal assistance, were unable to prevent. To this end the Secretary is required each year to ascertain and proclaim the national acreage allotment for the next crop of wheat; and this allotment is apportioned among the states, the state allotments are apportioned among the counties and the county allotments among the farms within the county. See §§1331, 1332, 1334(a), (b) and (c).

The Act also directs the Secretary to determine and proclaim a national marketing quota for wheat, whenever in any year the Secretary determines that the total supply of wheat will exceed the normal supply by more than twenty per cent. In such case the farm marketing quota for any crop of wheat is the actual production of the acreage planted in the farm less the amount produced on that acreage which is in excess of the farm acreage allotment. (§1340(1) Supp. 2). A farm marketing quota on wheat is not applicable to a farm on which the acreage planted is not in excess of 15 acres. A producer is subject to a penalty on his farm marketing excess at the rate of 45 per centum of the parity price as of May 1 in any year in which quotas are in effect. The

statute also provides for a referendum of farmers subject to the quota to determine whether they favor or oppose it and if more than one-third of the farmers voting oppose, the Secretary must suspend its operation—otherwise it goes into effect. §§1335(a), 1336, 1340(1), 1340(2), 1340(7).

If a farmer is dissatified with his marketing quota as determined by the County Committee, he may appeal to the Review Committee, and the decision of the Committee may be subject to an appeal to a District Court, or a State Court §§1363, 1365.

The Secretary is required to provide through county and local committees for the measurement of the farms on which the crop is produced in order to ascertain whether the acreage planted is in excess of the farm acreage allotment, and the Secretary is authorized to prescribe such regulations as are necessary for the enforcement of the statutory provisions. The Federal District Courts are vested with jurisdiction to enforce the provisions of the statute. The remedies and penalties provided therein are in addition to and not exclusive of any of the remedies or penalties under existing law. §§1374, 1375(b), 1376.

Pursuant to the statutory provisions the Secretary made a determination with respect to a national marketing quota and issued a proclamation thereof to be in effect with respect to the 1955-56 marketing year. He concluded that the total supply exceeded the normal supply by more than 20 per centum and therefore determined and proclaimed a national marketing quota for the year. A referendum of farmers was held in which 73.3% of the farmers voted in favor of the marketing quota program. 19 F.R. 3863, 4058, 5625.

The regulations promulgated by the statute in 1955 provide for the measurement by the County Committee of all farms having an allotment and also the farms where the Committee has reason to believe there is wheat available for harvest in 1955, regardless of its intended use. The purpose is to ascertain the acreage of wheat and whether it is in excess of the 1955 acreage allotment for the farm. The

measurement is under the general supervision of the County Committee and a reporter is directed to visit each farm assigned to him for measurement and enter therein if such entry will facilitate the measurement. The reporters are employees of the County Committee and the persons selected are determined to be qualified to perform the duties. A reporter may be assisted in the measurement by another reporter or by a member of the County Committee or by any employee of the Department of Agriculture when so directed by the Deputy Administrator. See 728.555 of Wheat Marketing Quota Regulations for the 1955 crop, 20 F.R. 1621.

The evidence taken at the hearing shows that a reporter designated by the County Committee to measure the acreage of the farmer appellants, together with the Vice Chairman of the County Commitee and an employee of the Department of Agriculture assigned by the Deputy Administrator to assist in the measurement, attempted in May, 1955 to enter the farms and make the measurement, but were prevented from doing so by the appellants who threatened to shoot them and inflict bodily harm if they entered the farms for this purpose. The agents testified that they could see some of the cultivated areas from the highway and could see wheat growing on the farms, one of which was 226 acres and the other 168 acres, but they could not see all of the cultivated areas and entry upon the farms was necessary to make the measurements. The agents had an aerial photo of a large area of the county, made in 1952, which included the appellants' farm and they desired to check this photo against the actual acreage on which wheat was grown. The county manager testified that the defendants had never received any assistance or benefit under the statute and had never cooperated with any of the programs. The farmers themselves did not testify. The District Judge accepted as true the testimony offered by the Government and granted an injunction enjoining the defendants from interfering with the agents in the measurement of the farms and the entry thereon of duly authorized employees of the County Committee or of the Department of Agriculture, provided that the number of persons entering on the farms should

not exceed three, and that the entry on the farms for the purpose of measurement should be limited to two visits.

Numerous objections were made by the appellants to the issuance of the injunction in the District Court and on this appeal, all of which were carefully considered in the opinion of the District Court. See *United States v. Shafer*, D.C. Md., 132 F. Supp. 659. They contend that the statute does not provide for entry on the farm and that the regulations,* which were issued by the Secretary and published on March 18, 1955 and provide for the measurement of the farm and for the entry of a reporter if such entry will facilitate measurements, do not provide for injunctive procedure in aid of entry. It is said that during the debate in the Senate** on the passage of the Act reference was made to the measurement of land under the Soil Conservation Act which provides for entry only by consent, and that until the passage of the regulations in 1955 the Administrative practice during the three years when wheat quotas were in effect, did not involve entry without consent;*** and hence it must be assumed that the statute did not contemplate such entry and that the regulations in this respect are invalid.

There is no reasonable basis for this argument. The statute expressly authorizes measurement and without it the purpose of the statute to control the production of wheat would be frustrated. Enforcement of the Act without the right of entry for purposes of measurement would be impossible, as is shown in the pending case. The statute is so clear on this point that there is no excuse for resorting to the legislative history; see *Pachard Co. v. Labor Board*, 330 U.S. 485, 492; and in any event the debate in the Senate contains nothing inconsistent with this interpretation. When it was found by an earlier experience in Carroll County, Maryland, which is described in the opinion of the District Court in *United States v. Morelock*, D.C.

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* See 20 F.R. 1621.

** 83 Cong. Rec. 1858.

*** In prior years since 1938 wheat quotas were in effect only in 1941-42, 1942-43, 1954-55. The right of entry was asserted in 1954-55. See *U. S. v. Morelock*, D.C. Md., 124 F. Supp. 932.

Md., 124 F. Supp. 932, that specific authority for entry upon the farm was needed, the regulations of 1955 were promulgated. We have no doubt that they were within the competency of the Secretary.

The authority of the court to issue an injunction under the circumstances of this case to aid in the enforcement of the Act is also beyond doubt. It is contended that the Government has not shown irreparable injury and that it has an adequate remedy at law in the provisions of Rule 34 F.R.C.P., relating to discovery, which permits entry upon land for inspection and measurement if good cause is shown in a civil action. The United States, however, is not bound to conform with the requirements of private litigation when it seeks the aid of the courts to give effect to the policy of Congress as manifested in a statute. It is a familiar doctrine that an injunction is an appropriate means for the enforcement of an Act of Congress when it is in the public interest. *Hecht Co. v. Bowles,* 321 U.S. 321; *Virginia Railroad v. System Federation No. 40,* 300 U.S. 515, 552.

The appellants go so far as to say that the regulations are unconstitutional to the extent that they authorize entry upon the farm without the consent of the farmer. Specifically it is said that the regulations violate the Fourth, Fifth and Tenth Amendments to the Federal Constitution; the Fourth Amendment because the regulations violate the prohibition against unreasonable searches and seizures; the Fifth Amendment because it forbids the deprivation of property without due process of law as well as compulsory self incrimination; and the Tenth because it reserves to the states the powers not conferred upon the Federal Government, including the power to regulate intrastate commerce. Little need be said in reply to these contentions. There is no violation of the Fourth Amendment because there is no search or seizure of the persons, houses or effects of the farmers but only an inspection of open fields. *Hester v. United States,* 265 U.S. 57, 59; *Janney v. United States,* 4 Cir., 206 F. 2d 601. Inspection of places of business under a statute within the power of Congress does not violate this

Amendment. *United States v. Crescent Kelvan Co.*, 3 Cir., 164 F. 2d 582; *Currin v. Wallace*, 306 U.S. 1, 12.

As to the Fifth Amendment, it is sufficient to point out that the instant suit is not a criminal prosecution. The Act provides only for civil penalties and the farmers are not compelled to give evidence against themselves. *Rodgers v. United States*, 332 U.S. 371, 374. Furthermore the Act does not deprive the farmer of his property without due process of law. This question was settled by the Supreme Court in *Wickard v. Filburn*, 317 U.S. 111, which held that a statute does not violate the amendment merely because it is deemed in a particular case to work an inequitable result and that the Agricultural Adjustment Act lies within the power of Congress to regulate interstate commerce although it regulates production not intended for commerce but wholly for consumption on the farm. Such production has an indirect effect upon such commerce even although the amount produced in a particular instance may be trivial. Hence there is no violation of the Tenth Amendment. See also *Mandeville Farms v. Sugar Co.*, 334 U.S. 219.

The validity of the regulations of 1955 principally relied on by the Government* is attacked on the ground that they were not promulgated by Ezra Taft Benson, Secretary of Agriculture himself, in accordance with §1375 of the statute, but by True D. Morse, Acting Secretary. The regulations specifically provide that the reporter, assisted if need be by other authorized agents of the Secretary, shall visit and measure each farm assigned to him and enter thereon if entry will facilitate the measurement. This circumstance, however, prevents no infirmity in the regulations. It is provided in 5 U.S.C. §4 that in case of the death, resignation, absence or sickness of the head of any department, the first or sole assistant thereof shall perform the duties of such head. It is also provided that the Under-Secretary of Agriculture is authorized to exercise the functions and perform the duties of the First Assistant of the Secretary of Agriculture within the meaning of §4 and to perform such other

* §§728.550 — 728.597, 20 F.R. 1621; 728.510 — 728.526, 19 F.R. 3249.

duties as may be required by law or prescribed by the Secretary. 5 U.S.C. §5 14(b). An Assistant Secretary of Agriculture has such duties as are assigned to him by the Secretary. See 5 U.S.C. §517 and Reorganization Plan No. 2 of 1953, 18 F.R. 3219. It is also provided in Executive Order 10.481, 18 F.R. 4944, which was issued pursuant to 5 U.S.C. §6, that in case of absence, sickness, &c. of the Secretary of Agriculture, the Under-Secretary of Agriculture and the Assistant Secretaries of Agriculture shall perform the duties of the office of the Secretary of Agriculture.

The Supreme Court has pointed out that in many situations it is impossible for a head of a department to perform in person all the duties imposed upon him by his office and consequently statutes have created the office of Assistant Secretaries for the various departments. The court said that it would be subversive of the purposes of these statutes if their acts were held to be of no force until ratified by the head of the Department. *Parish v. United States,* 100 U.S. 500, 504; *Morgan v. United States,* 298 U.S. 468, 479. Furthermore, there is a presumption in the absence of clear evidence to the contrary that official action taken has been duly exercised; *United States v. Chemical Foundation,* 272 U.S. 1, 14-15; and the publication of a document in the Federal Registry creates a rebuttable presumption of validity. See 44 U.S.C. §307.

The Secretary of Agriculture was not a necessary party to the suit as claimed by the appellants. It is sufficient that suit was brought in the name of the United States by the United States Attorney. See *Usher v. United States,* 4 Cir., 146 F. 2d 369; *Insurance Co. of North America v. United States,* 4 Cir., 159 F. 2d 699; *United States v. Allied Oil Corp.,* 341 U.S. 1, 5; *McKay v. Rogers,* 10 Cir., 82 F. 2d 795, 798; 28 U.S.C. §507(a)(2).

Affirmed.

DECREE

(Filed and Entered January 4, 1956)

UNITED STATES COURT OF APPEALS
For The Fourth Circuit

No. 7091

Lindsay B. Shafer, Lewis Shafer, Joseph Shafer, and Lewis Shafer, Sr.,
Appellants,

versus

United States of America,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

This Cause came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by Counsel.

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

JOHN J. PARKER,
Chief Judge, Fourth Circuit.

MORRIS A. SOPER,
United States Circuit Judge.

ARMISTEAD M. DOBIE,
United States Circuit Judge.